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Argument of an Appeal

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THE ARGUMENT OF AN APPEAL†

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The argument of an appeal is, in most cases, the last, and frequently the most important step in the trial of a lawsuit. In the appellate court, a case which up to that point has been lost, may still be won. On the other hand, a case which has been carried thus far with success may nevertheless be lost. Anyone can cite numerous examples from the myriads of decisions which are authority for this truism. If it be thought that, occasionally at least, some cases have been wrongly decided, and that still other cases may yet be, this should be a further incentive to appellate counsel to assist the court. And in these days when divided courts may be more common the challenge to appellate counsel is even greater.

Upon this very old subject I have no delusion that I may present any new thought. Nor do I have any notion that I might fall within the rule of property once laid down in verse by James Russell Lowell:

> "Though old the thought and oft exprest,
> 'Tis his at last who says it best."

What I hope to say, although admittedly not new, has—to speak conservatively—been demonstrated so thoroughly to have eluded general mastery and to have failed to receive uniform application that repetition is not only justified now but undoubtedly will be throughout the predictable future.

At the outset it should be appreciated that a great change has occurred in appellate practice in the last one hundred years. In the early years of the Supreme Court of the United States the oral arguments consumed hours and, in some cases, days. This could only have been with the approval and encouragement of the judges, who must have felt that this assisted them. As time progressed, changed conditions vastly increased the case load of the courts, and there is now a marked tendency to the other extreme of restricting greatly the time permitted for oral argument. Judges think that this method will best assist them in their work as a whole. No disapproval of the principle of oral argument is involved. It means merely that in these days less rather than more talking on both sides fits in better with the scheme of things judicial.

Let us begin with a few words about the record, which is, or should be, the tangible reproduction of the case. In my State the printing of the record

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is in the hands of the clerk. What it should contain is settled by statute, by rule of court, and by decision. It is most prudent, however, to confer with the clerk to make sure that the record contains everything that one is entitled to have included, and, what is equally important, that it is not cluttered with anything which there is a right to have omitted and which neither counsel intends to use. Those moments are most wearisome which are devoted to arguments and discussions arising out of belated discoveries of avoidable shortcomings of the record.

Once the record is printed and received, counsel must adhere to the fundamental rule which permeates the whole subject of appeals: Know the record! Its substance must be mastered in order to prepare the brief, and, for the most effective oral argument, this mastery must be retained and alertly supplemented by a geographical familiarity—that is, by page and line—with its every nook and cranny as perfect as was the knowledge of Nydia of the smoke and cinder filled streets of Pompeii. Failure to know and to understand a record sometimes results in the argument of a different case than is in fact or in law before the court.

Once a case has reached the appellate court the procedure, I suppose, does not differ much throughout the country. Essentially it is this. Upon the basis of a printed record there must be prepared a printed or written brief, the length of which usually is not, but nevertheless may be, limited by rule. This may be, and usually is, followed by an oral argument, the length of which is rigorously limited by rule. This means that one should make the best use of each of his two weapons, the written and oral argument. The argument in the brief may be extensive, but the oral argument must be intensive.

The brief should be drawn with an eye toward creating a favorable first impression in the judge's mind. It should be able to weather oral assault by an opponent, who will surely have read it before the arguments. It should contain everything which is worth arguing in the case, and should cover with finality questions like those of evidence, which can at most merely be adverted to orally. On the other hand, whatever, upon mature deliberation, is considered unworthy of argument should be frankly and expressly waived. This was Abraham Lincoln's method, and it was a good one. It is a practical recognition of the rightness of Cardozo when he wrote, "Analysis is useless if it destroys what it is intended to explain."

The preparation of the brief should proceed in the knowledge that it is timeless and tireless in its ability to speak. Owing to the case load of each judge and the number of working days in the year there is no secret in

the disclosure that an opinion may take form under tremendous pressure. It is also true—at least it is with me—that at some moment in the consideration of a great many cases the scent suddenly becomes very hot. The physical processes—the hand if you write, or the tongue if you dictate—struggle to keep pace with the mental. The excitement may be genuinely great. I recall a cartoon in a leading periodical of a hunter riding alone who without warning came upon three foxes. His ejaculation, "Tallyho for goodness' sake," becomes the apogee of understatement in comparison with the judicial sensations at the moment to which I refer. The brief maker should take all this into account. On that indefinite future day, perhaps weeks after the arguments, when the writer of the opinion, in the solitude of his lonely room, starts work on the case, the brief with all its merits and all its shortcomings is there before him to read if he will. And he most certainly will read it on the issues material to the line of reasoning of the projected opinion. In fact, he may re-read it a score of times, particularly if it be the brief of the side which at the moment appears to have the worse of the argument on the point under consideration.

In aiding this cloistered workman, the advocate should realize that he is aiding his own cause. Hence, he should make sure that his brief is appropriate, and neither too long nor too short for the particular case. The facts must be fittingly set forth with supporting references to the record which are accurate and explicit. Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or the statement of a fact off the record. The latter failing is especially pernicious, as it sends the writer of the opinion on a wild-goose chase hardly calculated to enhance his estimate of the soundness of the legal principles of him who brought it about.

The statement of facts should be succinct but at the same time full and complete as to the material issues. Such a statement is not easy to prepare, but it probably is the most important single thing appeal counsel has to do. Facts tend to complexity and often are double-edged blades. Two great figures, one in English, and one in American, literature, were both right, when they respectively said many years apart, "Facts are stubborn things," and "Facts are contrary 'z mules."

If a statute, city ordinance, town by-law, or rule of some court or administrative body is involved, it should be quoted accurately and in full. The places in the record where the questions of law arose should be meticulously cited. The newspaper headline format is out of place and constitutes self-confessed ineffectiveness of expression. The brief should be

logically arranged by topic with reasonable citation of authorities, so that, when the three foxes sooner or later appear, the judicial huntsman will not lose too much time in hurdling any hedges in the reasoning, or be led off the scent through citations which may not be in point or which may be unreasonably numerous or incorrectly given. The citations should be selective and support the respective propositions of law. Citations are not merely conventional, like marks of punctuation, nor are they like architectural embellishments added for no utilitarian purposes but solely for adornment. The suggested purpose will not be attained by listing the first cases remotely in point which are discovered, much less by transcribing on faith directly to the brief an uncensored galaxy of citations clustered in the footnotes of some digest or other stock of prefabricated material. The members of a court need no indiscriminate ticket of admission to the library stacks. If no case in point be found, it is better to cite none, and to emulate the frankness of the English counsel, immortalized in one of the case books I used in law school, who, when asked by the court what authority he had for his statement, responded, "None, my Lord, but I submit that it must be true on principle." If your brief is long, and you have cited a large number of cases, an index is desirable, even though the rules of the particular appellate court may not require it. When you cite the Federal Reporter, give the name of the court in parenthesis. It may be important to indicate whether it is a decision of the Court of Appeals of the Second Circuit or of a District Court judge deciding a case in the first instance. Don't cite the arguments of counsel, which are sometimes printed in the law reports, unless, on rare occasion, you mean to do so and refer to them as such. Don't cite cases which have been overruled unless, on rare occasion, you mean to do so and refer to them as such. Mr. Shepard will help you here. If you quote from a decision in another case, quote it absolutely accurately. Should you omit from the quotation parts of that decision which you deem immaterial, carefully indicate any omissions. Above all, take care not only to avoid garbling the quotation but to avoid the least appearance of doing so. Do not use those disconsolate inadequacies, *supra* and *infra*. They border on the discourteous unless the point referred to is but a few lines away, and in that event they are not needed.

I shall leave this topic by saying that I do not believe that the brief can be proofread too often or too carefully. It should be checked with the record and with the original law reports, not with your own draft. Such reading crystallizes knowledge of the issues. It is the best preparation for the oral argument. And it should utterly eliminate typographical errors. One or

two undetected misprints may be excusable in these days of post-war printing, but any considerable number tends to destroy confidence in the substance of the brief itself and in the conscientious thoroughness of its preparation.

The other weapon of contending counsel on appeal, the oral argument, affords a great opportunity. It is a mild euphemism to aver that this opportunity is sometimes not fully realized. Appellate argument resembles general literature. Almost anyone has some critical competence, but only the few achieve a standard of performance which the many sense. Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole. This continues true notwithstanding that there have been delivered highly distinguished exhortations on the subject, many of which have been published and are easily available.

A bench of appellate judges is commonly composed of just so many ordinary men. If it is not, there is something wrong, something non-human, about that particular bench. That the bench and the bar are sprung from a common fungible source is illustrated by the statement of a distinguished Pennsylvania lawyer who declined appointment to the bench because, as he has been quoted as saying, he would rather talk to fools than listen to them. Counsel should never forget this identity of origin, and in their arguments should try to enlist the sympathetic interest of their fellow humans, the judges. This calls for a supreme effort to make the presentation as attractive as possible, both in substance and in form. The vital point or points should be exposed and attacked incisively. This calls for careful deliberation in advance. The manner of speaking should be varied to attain the proper degree of impressiveness. A monotonous intonation should be avoided. In this connection it is constructive to think of the baseball pitcher who has a good change of pace.

I have already said that the oral argument must be intensive, and it has to be, in order to achieve, within the limited time, effective fire power upon the fleeting target. Counsel wants the court to understand the case, and, at the same time, to understand it his way. The right method of doing this is simple: Tell the judges about it. Give them the facts, and begin by giving them the facts. The very first sentence should focus attention upon the general nature of the controversy. It should settle, once and for all, whether the subject at hand is a murder, a taking by eminent domain, a divorce, or the application in a will of the rule against perpetuities. No matter how interesting—to counsel—the points of law may be, they should be merely

indicated and not argued until the essential facts have been stated, even if this requires reliance upon the brief for much of the law. This means that there should be a budgeting of the allotted time and, except in emergency, a rigid adherence to it.

To the court every new record is a mystery. Sometimes it is also a labyrinth. Whatever their legal qualifications judges usually are neophytes as to the facts of a particular case. In my experience it is seldom that there has been an opportunity before the arguments to study the records or the briefs. Even on rare occasion when a judge is able to do this, he does not acquire from the cold record the grasp of detail and the perspective of the facts which counsel always should, and usually do, possess. In my earlier days, while traveling in Europe, before striking a new town, I always studied a street plan, so that I might later find my way about without contemporaneous consultation of a guidebook. By analogy, the oral argument could be the introduction and guide to the record and briefs. It is advisable if possible, during the argument, to induce the judges to make on their copies of the record and of the briefs, as many pencil marks as may be reasonable to indicate facts or authorities favorable to the contentions. Counsel should give them his view of the mystery, and if there be a labyrinth, he should guide them his way to the place where the Minotaur is to be found. Likewise, if there are important plans, photographs, or documents, not printed in the record but incorporated by reference, this information should be called to the attention of the court early in the argument. What a futile sensation it is when a somewhat blind argument makes this revelation almost by way of peroration!

If, notwithstanding every conscientious act of thoroughness, errors have been discovered in the record or in your own brief, bring them to the court's attention by page and line early and before the argument really gets under way, but preferably not as the topic sentence. If you find similar errors in your opponent's brief, tell him privately, so that he may correct them on his time and not on yours.

A statement of facts should contain the facts, all the facts, and nothing but the facts. Statements off the record are just as bad in the oral argument as in the brief. The inevitable dénouement may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful. Equally devastating is the suppression of a vital fact. In a certain case of the Sherlock Holmes type, the defendant's counsel argued his full time without mentioning anything remotely connecting his client with the crime. The presentation differed from Poe's truncated *Murders in the Rue Morgue*

only in not being admittedly fragmentary. The prosecuting attorney in a few moments then supplied the omissions which rendered the whole evidence as cogent as that which satisfied Robinson Crusoe that he was not alone on the desert island. A delay of one hour in the full exposure of the facts is hardly worth while. To entertain an expectation that such exposure may not occur is sheer chauvinism. There was a wise saying in the Field Service Regulations of the United States Army which went something like this, "Always attribute to the enemy the same intelligence as your own even though he may not possess it." This is equally applicable to an argument on appeal. I believe it must have been this sort of thing which Thomas More had in mind when he wrote in his *Utopia,* "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."

An inevitable and valuable part of the arguments is the questions by the court. Although often so regarded, they usually are not a manifestation of unfriendliness. Nevertheless, a question may be. There is the instance in that delightful book, "Philadelphia Lawyer," where the judge's question was met by the response, "Your Honor, I am addressing myself exclusively to those members of the court who do not make up their minds until the conclusion of the argument." Of course, no advantage lies in feeling, much less in betraying, annoyance. There is the occasion of the counsel who had closed his argument without damage from his own efforts or those of his opponent only thoroughly to be discomfited at the last moment by an interrogation from the bench. He then turned to the spectators and inquired, "Is there anyone else present who would like to ask any questions?"

Questions by the court most often spring from a yearning for the facts. They sometimes are means of communication to a colleague on a distant part of the bench, perhaps in reply to a question of his to counsel. In the main, they serve to advise the advocate of the issues to which at least one judge is directing his attention, and as such are a coöperative effort to make the best use of time, and thus expedite a just determination of the cause.

It often happens that a question is asked which relates to a matter which counsel intends to consider at a later point in his argument. The best way to handle the situation is for counsel to state briefly what the answer is to be and say that he will cover the matter more fully before he closes. But should he follow this course, or should he feel that to give an answer on the spot would require too long a digression and that he wishes to be excused temporarily from answering, under no circumstances should he omit to carry out his promise. To fail in this respect evokes judicial speculation

as to the reason. Was it an oversight? Was it ignorance? Was it evasiveness? Or was it something else? And if so, what was it, and what is its bearing upon the merits of the case?

One situation which occasionally arises in questions from the bench is beyond the control of counsel. It may be that a judge may put a formidable question before counsel scarcely has begun to speak or to have had a fair opportunity to state his position. In that unfortunate plight the most that counsel can do is respectfully and tolerantly make the best answer he can, and trust to good fortune that he will be able to resume stride without losing too much precious time.

Like every speaker on this subject, I have a few favorite "Don'ts." The brief reader may be dismissed with an anecdote. Wearied by the futile consumption of time by a lawyer who was droning through his brief, a helpless judge wrote on a piece of paper, "A brief reader is the lowest form of living animal," and then passed it to a colleague. The latter read it, took a pencil, wrote, "He is a vegetable," and passed it back.

A brother of the half-blood to the brief reader is the counsel who instead reads a prepared statement. The only difference to be observed is that it is harder to guess the probable length of the ordeal when, unlike with the brief, there is no copy in one's own hands. Regardless of what is read, the very act of reading draws an iron curtain between counsel and the sympathetic attention of the court.

Do not relate the facts of cited cases in painful detail. They are too many to be absorbed from oral presentation. It wastes time that can be utilized to better advantage. In the average case it is sufficient to announce that you rely on such and such cases. The court, before deciding the case, will read them just as carefully as have counsel if they are even remotely material to the reasoning of the opinion.

One should never volunteer the statement that he did not try the case below. It is at most a defensive remark, and is too suggestive of *"Sauve qui peut."*

If extra time is allowed for the argument, this should not be regarded as an offer by the court to a unilateral contract to be accepted only by a speaking performance which persists till the last grain of sand has run out of the hourglass. The words that remain unspoken under such conditions beget much good will, particularly with the attending members of the bar awaiting their turn to address the court. This principle applies to all arguments. In an earlier court generation one youthful counsel, who asked how much time he was permitted, was told, "You have half an hour to talk, but you do not have to talk half an hour."

It is just as important to close as it is to open. The argument should not be a one-way ticket to nowhere. Upon reaching the predetermined destination, one should alight. In other words, he should make clear his final point, stop talking, and be seated. And in so doing expressions of gratitude or thanks to the court for their attention are most unhappy. Such a rhetorical anti-climax is, at best, none too pleasing to the judicial ear. Some years ago such a conclusion more than once evoked a judicial reminder that listening was the very minimum of the duties of the office to the faithful performance of which all the members had been duly sworn.

There is sometimes the problem whether to argue orally or to submit on briefs. If the record is complicated, my advice is not to lose a golden opportunity to set forth the facts in the presence of those who must understand them before they can decide the case. If the record is not complicated, and if you prevailed in the court below, and if your opponent is going to submit, it may be wise to rely on your brief provided you are still satisfied with it. But if you were unsuccessful below, or if you were successful and your opponent is going to argue orally, it is my belief that allegiance to the cause calls for oral argument on your part. General rules without exception applicable to every case can not be laid down, and what I say is only the view of one judge of one court, and not the result of any Gallup poll.

One may wonder how it is possible, in a half hour or in an hour, to make an oral argument upon appeal and yet do justice to a case which may have taken days, or even weeks, to try in the lower court. One answer is that the judges have a profound familiarity with the law of their own jurisdiction. They are also experienced listeners, and are alert to detect wherein the argued case resembles decided cases. With a skillful oral statement of the salient facts and with the brief to rely upon, it is seldom necessary to do more than guide their minds from the cornerstone of fact to the structural outline of the legal principles believed applicable. It is not uncommon that when a case is called for argument, counsel in tones approaching despair proclaim their inability to argue within the prescribed time limit and beg for an extension. It is my observation that, aside from capital cases, counsel, more often than not, fail to give the court assistance commensurate with any additional time allotted.

In my early days of practice, I asked a leader of my local bar what he considered the best method of learning to try a case. He responded, "Try and try and try, and get licked over and over again." I do not think it is indispensable to taste exclusively of the cup of defeat in order to acquire proficiency in appellate argument. But experience is the only guide, and

that means an experience based upon a planned course designed to avoid mistakes, and, after mistakes inevitably occur, to avoid their repetition. In this, as in other fields of the legal profession, the successful practitioners are not men—if there be such—who never made a mistake, but are men who undismayed do not repeat them.

I believe I have demonstrated how difficult it is to disclose any really new aspect of this very old human relationship, the argument of appeals. It is fortunate perhaps that discoveries in this field are unlikely, because the old has proved more than adequate to test the mettle of both judge and advocate. In the great *nisi prius* case of *Shylock* v. *Antonio,* the plaintiff asked one question which at the time did, and usually would, provide its own answer, "Woulds't thou have a serpent sting thee twice?" As an aspect of the argument of appeals there may be more than one view as to the proper answer to that question. At all events, I trust that I may be accorded pardon for any superfluous sting.